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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM S. JOHNSON,

Petitioner,

vs.

CENTRAL VALLEY SCHOOL DISTRICT NO. 356,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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November 5, 1982

Questions Presented

1. Whether the Indian "preference" in employment provided by the Indian Self Determination and Educational Assistance Act, 25 U.S.C. Sec. 450e(b) requires a state school district to hire a qualified Indian applicant over a better qualified non-Indian applicant for an Indian Tutor-Counselor position where such position is funded under an Indian Education Act (20 U.S.C. Sections 241aa - ff (Supp. 1972)) grant for the benefit of Indian children?

2. Whether the failure of an Indian Education Act grant to specifically condition the grant on compliance with a specific definition of "Indian preference" under 25 U.S.C. Section 450e(b) of the Indian Self Determination Act renders such preference requirement inapplicable under this Court's decision in **Pennhurst State Sch. & Hosp. v. Halderman**, 451 U.S. 1 (1981)? Does it make any difference if the grantee knew "Indian preference" was required and advertised the employment position accordingly?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM S. JOHNSON,

Petitioner,

vs.

CENTRAL VALLEY SCHOOL DISTRICT NO. 356,

Respondent

The petitioner, WILLIAM S. JOHNSON, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on June 3, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, reported at 97 Wn.2d 419, 654 P2d 1088, appears as Appendix "A". That Court's order denying petitioner's motion for reconsideration appears as Appendix "B".

JURISDICTION

The opinion of the Supreme Court of the State of Washington was entered June 3, 1982. Timely motion for reconsideration was denied August 17, 1982. The Mandate of the Supreme Court of the State of Washington reflecting that the opinion of the Court became the decision terminating review on August 17, 1982, appears as Appendix "C" and this Petition for Certiorari will have been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

FEDERAL STATUTES INVOLVED

25 U.S.C. Section 450a provides:

Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of education as well as other Federal services to Indian communities so as to render such services responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

(Pub. L. 93-638, Sec. 3; 88 Stat. 2203)

25 U.S.C. Section 450e provides, in relevant part:

Wage and labor standards and preference requirements for contacts or grants

***

(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934, as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible - -

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcon-

tracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

(Pub. L. 93-638; Sec. 7; 88 Stat. 2205)

20 U.S.C. Section Section 241aa provides, in relevant part:

Congressional declaration of policy

(a) In recognition of the special educational and culturally related academic needs of Indian students in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out the elementary and secondary school programs specifically designed to meet these special educational or culturally related academic needs, or both. (. . .)

(Pub. L. 95-561, Title XI, Sec. 1142(a); 92 Stat. 2329)

* * *

20 U.S.C. Section 241dd provides, in relevant part:

(b) An application by a local educational agency or agencies for a grant under this subchapter may be approved only if it is consistant with the applicable provisions of this subchapter and

(1) meets the requirements set forth in subsection (a) of this section;

(2) provides that the program or project for which application is made - -

(A) will utilize the best available talent and resources (including persons from the Indian community) . . .

(Pub. L. 95-561, Title XI, Sec. 1144; 92 Stat. 2329)

STATEMENT OF THE CASE

Petitioner, William Johnson, is one-quarter Montouk Indian of the Brotherton Tribe. (CP 34; Ex. 1; RP 124)[1] In August, 1980 Mr. Johnson applied for employment with Central Valley School District No. 356 ("District") for the position of Indian Tutor-Counselor. (Ex. 22; CP 42 - Find. of Fact XVII) This position was funded by a Federal grant under the Indian Education Act (20 U.S.C. Section 241 aa-ff (Supp. 1972)). Among approximately nine applicants for this job only Mr. Johnson was of Indian descent. (CP 42-43; Find. of Fact XVIII) Ultimately, two of the applicants, Mr. Johnson and a non-Indian, Mr. Covella, were considered for the position. (CP 42-43 - - Finds. of Fact XVIII, XIX) Mr. Johnson was not hired. (RP 146-47)

Mr. Johnson commenced an action in state superior court against the School District for money damages and injunctive relief. (CP 1-4; 8; 10) He alleged five claims for relief. (**Id.**) Four of these claims asserted violations of state law and the fifth alleged a violation of 25 U.S.C. Sec. 450e(b) of the Indian Self Determination and Educational Assistance Act,[2] for failure of the School District to comply with the "Indian preference" requirement of that provision. (CP 1-4; 8; 10)

After trial on the merits, the trial court found against Mr. Johnson on all state claims but ruled for Petitioner on his federal claim for violation of the "Indian

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[1]"CP" refers to the Clerk's Papers, the pleadings, etc., of record before the State Supreme Court. "RP" refers to the verbatim Report of Proceedings of the trial, also of the record below.

[2]This Act is hereafter referred to as the Indian Self Determination Act.

preference" requirement. (CP 46; 50-51) The court specifically found:

> In their determination regarding whether to hire Mr. William Johnson or Peter Covella for the position of Indian counselor-tutor with defendent School District, the Executive Committee of the Native American Advisory Committee, Neil Prescott, Charles Stocker, and derivatively, the Board of Directors of Central Valley School District, used an erroneous definition of "Indian Preference". This Court finds that in order to effectuate the congressional intent and underline legislative policy of the Indian Education Act and the Indian Self-Determination Act, the concept of "Indian Preference" to the "greatest extent possible [sic]," requires, in this instance, that if a person of Indian origins meets the qualifications for the position that person must be offered such position even if there are more qualified persons o[f] non-Indian descent.

(CP 46; Find. of Fact XXIV). It awarded Mr. Johnson limited damages and ordered the School District to hire him as Indian tutor-counselor for the next ensuing school year. (CP 54-55)

Both sides appealed. (App. A at 18) Mr. Johnson challenged denial of three of the state claims and the failure of the court to award certain additional relief. (Id.) The School District challenged, as it did below, the superior court's jurisdiction to entertain the federal claim, and its interpretation of the "Indian preference" requirements. (CP 51; 54) The Washington Supreme Court reversed. In so doing, the Court upheld dismissal of the state claims and addressed the federal claim on the merits, concluding the "preference" provision of the Indian Self Determination Act had not been violated and the School District's actions were proper. The

Washington Supreme Court concluded, without discussion, the federal cliam was cognizable in the state court. (App. A) Although the state claims for relief were resolved solely on the basis of state law, including the issue of the timeliness of additional certification required for counselors, resolution of the federal question of "Indian preference" was based entirely on analysis of the substantive law under the relevant federal statutes and this Court's decisions regarding Indian rights.[3]. (**Id.**)

The facts set forth in the opinion of the Washington Supreme Court, Appendix A, pp. 15-18, **post** are accurate and incorporated by reference.

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[3]Review of the Washington Supreme Court's decision reflects the timeliness **vel non** of Mr. Johnson's receipt of his state counselor's certificate was dispositive of several state claims. However, this issue surfaces only **after** discussion and resolution of the federal claim. The Court does not state or imply that any lack of certification was an adequate and independent state ground in deciding the Indian preference claim. Had certification been deemed a threshold question as to the Indian preference claims presumably it would have been treated as such. Further, if Indian preference had been recognized, the Court may then have concluded that had the School District timely acknowledged its obligation to hire Mr. Johnson, on or about August 10, 1979, the actual certificate would have been received before commencement of the school term, and sided with case authority finding that sufficient. **See, Johnson v. Central Valley School Dist.**, 97 Wn.2d 419, 421, 432, 654 P.2d 1088 (1982); (RP 200-219; 256-57; Ex. 24; CP 42-44; Supp. CP 34-48). Such a result would be a consonant with the "greatest extent feasible" requirement of 25 U.S.C. Sec. 450e(b).

Since no adequate and independent state ground is present in the State Court ruling on the federal question Petitioner meets this Court's requirements set forth in **Herb v. Pitcairn**, 324 U.S. 117 (1944). **See, Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U.S. 562, 568 (1977).

REASONS FOR GRANTING THE WRIT

In **Morton v. Mancari**, 417 U.S. 535 (1974), this Court upheld a statutory employment preference for qualified Indians in the Bureau of Indian Affairs in light of the "unique legal status" of Indians in this country. The Court concluded:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such judgments will not be disturbed.

417 U.S. at 555. **See also, Mescalero Apache Tribe v. Hickel**, 432 F.2d 956 (10th Cir. 1970), **cert. denied**, 401 U.S. 981 (1971).

Subsequently, in 1975, Congress enacted the Indian Self Determination Act, 25 U.S.C. 450 et. seq. (1975). In recognition of "the strong expression of the Indian people for self-determination" Congress committed itself to

> the establishment of a meaningful Indian self-determination policy which will permit the orderly transition from Federal domination of programs and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services.

25 U.S.C. Sec. 450a.

As one means of effectuating this policy of self-determination Congress affirmatively required, **inter alia**, that in any contract or grant under the Indian Self Determination Act "or any other Act authorizing Federal contracts [or] . . . grants for the benefit of Indians" that ". . . to the greatest extent feasible . . . preferences . . . for . . . employment in connection with the administration of such contracts or grants shall be given to Indians . . .". 25 U.S.C. 450e(b) To Petitioner's

knowledge this is the first case to reach this court involving interpretation and application of these off-reservation, non-Indian service preferences required by the Indian Self Determination Act. **Cf. Andrus v. Glover Construction Company**, 446 U.S. 608 (1980).

The Washington Supreme Court's decision below resolves an important question of federal law in a manner which conflicts in principle with this Court's decision in **Mancari** and which substantially undermines the clear congressional mandate of the preference provision of the Indian Self Determination Act.

First, the Washington Court concludes the preference provision is not absolute, but only "to the greatest extent feasible", and therefore the local school district is at liberty to select a better qualified non-Indian applicant where the Indian Education Act grant is conditioned on the school district utilizing the best available talent and resources. (**See**, 20 U.S.C. 241 dd(b)) On this basis, the Court sanctions an interpretation of "preference" which allows the School District to hire the best qualified person and only when an Indian happens to be equally qualified with a non-Indian does the preference come to play. Such an interpretation renders the statutory preference hallow, if not illusory, for ultimately, absent equal qualification, the Indian applicant will be hired only if deemed the best qualified applicant. Mr. Johnson urged below that if he was the only qualified Indian applicant the School District was required to hire him for the Indian Tutor-Counselor position. This interpretation, adopted by the trial court and anticipated by the HEW Division Director of the Office of Indian Education assigned to administer the

type of grants in question,[4] gives full meaning to the "greatest extent feasible" preference. Given the national scope of the Indian Education Act grant program, and the likelihood that other states and their local school districts will view the preference similarly, this Court should resolve these differing views and clarify the scope and application of this preference.

Secondly, the Washington Supreme Court determined that the definition of Indian preference requiring the hiring of a qualified Indian over better qualified non-Indians could not be imposed upon the School District since such condition was not set out in the grant, citing **Pennhurst State Sch. & Hosp. v. Halderman**, 451 U.S. 1 (1981). Reliance on **Pennhurst** is inappropriate as a means for fashioning a restricted definition of "preference" since, here, applicability of the Indian Self Determination Act preference to this grant is clearly and unequivocally required by the Act, the School District was aware of the requirement and advertized the position with it in mind, and also knew of the "permissable reading" of what the preference required according to federal officials. It applied a different definition of preference at its peril. In order to avoid the particular language of a grant from being

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[4]Mr. Hakim Kahn, Division Director, in a memo which was distributed to Central Valley School District, specifically warned that "a permissable reading" of the preference provision of the Indian Self Determination Act, 25 U.S.C. 450e(b), may require a minimally qualified Indian applicant be hired over a better qualified non-Indian applicant. (Ex. 18; RP 48-49) Subsequently adopted federal regulations required Indian preference for awards under the Indian Education Act. 20 U.S.C. 241 aa-ff (Supp. 1972). See, 45 C.F.R. 186.5.

seized upon to eclipse the clear intent of Congress in requiring preference "to the greatest extent feasible" this Court must clarify **Pennhurst**.

Lastly, there is reflected in the opinion of the Washington Supreme Court a concern that a definition of "Indian preference" requiring the hiring of Indians over better qualified non-Indian applicants would have constitutional implications. While the Court upholds the Indian Self Determination Act, it interprets it in a manner that "avoids the specter of racial discrimination which the United States Supreme Court has indicated would arise if the BIA concept of Indian Preference were applied outside the 'unique setting' of the bureau and Indian reservation environs". 97 Wn.2d at 429; App A at 27. This concern is predicted on language in this Court's **Mancari** decision. **Mancari**, 417 U.S. at 554. This is not the first occasion where the Washington Supreme Court has adopted a restricted view of Indians' substantive rights in light of equal protection principles. **See, State of Washington v. Washington State Commercial Passenger Fishing Vessel Association**, 443 U.S. 658, 672-73, Fns. 19, 20 (1979). The Indian Self Determination Act's preference provisions are constitutional. **Mancari, supra; cf. United States v. Antelope**, 430 U.S. 641 (1977). Although the Washington Supreme Court did not declare otherwise, its interpretation of the Indian Self Determination Act was affected by its stated views. Petitioner asserts the result is an erosion of the substantive rights created by the Indian Self Determination Act. This Court has the opportunity here to clarify the intent, meaning and scope of this Act's preference provisions, thereby resolving speculation on the constitutional issue and minimizing the prospect of non-uniform interpretation of the Act.

The Washington Supreme Court erred in reversing the trial court's finding of entitlement to Indian preference. The facts here involve a quintessential example of what Congress sought to achieve with the Indian Self Determination Act, **i.e.**, Indian school children at an off-reservation state school being tutored and counseled by persons of Indian heritage. However, not just one position and a few Indian children are at stake here. The Indian Education Act grant program is national in scope. The same preference provision of the Indian Self Determination Act involves federally funded **contracts** for the benefit of Indians. The Washington Supreme Court's ruling, binding in Washington, may likely have extra-territorial ramifications as secondary authority in light of sparse precedent in this area.

This Petition involves important questions of federal law which have not been, but should be settled by this Court. The decision of the Washington Supreme Court conflicts in principle with this Court's decision in **Mancari** and the clear language of the Indian Self Determination Act. This Petition should be granted. Rule 17.1(c), RULES OF THE SUPREME COURT.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Washington.

Respectfully submitted,

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"APPENDIX A"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM S. JOHNSON,

Appellant,

v.

CENTRAL VALLEY SCHOOL DISTRICT NO. 356,

Respondent.

No. 48293-4

EN BANC

Filed June 3, 1982

This suit was brought by a certified teacher seeking damages for denial of a position as tutor-counselor under a federal grant, and mandatory reinstatement to that position.

Central Valley School District had, at the time of this suit, approximately 11,000 students, of which 175 were of Indian descent. In 1977 the school district applied for and was awarded a grant under the Indian Education Act, 20 U.S.C. § 241aa-ff (Supp. 1972). A condition of the grant was that the district commit itself to "utilize the best available talents and resources (including persons from the Indian community"). The grant was made for the benefit of Indian children. The money received from this grant was used to employ the plaintiff, a person of Native American heritage, as a half-time tutor-counselor for the school year 1977-78. His employment

was approved by an advisory committee composed of Indian parents, which was formed as a prerequisite to obtaining the funds. The plaintiff was issued a teacher's certificate in 1978 but did not have a counselor's certificate. He was rehired for the same position in 1978-79, when funds had been increased to allow for a 3/4-time position. The advisory committee recommended that appointment. Attached to this 1-year contract was a typewritten acknowledgement, signed by the plaintiff, that the contract, being federally funded, was not a continuing one.

During the 2 years that the plaintiff served in this capacity, he was encouraged to complete the requirements for a counselor's certificate, and before the end of the second year, the school district was notified by the State Superintendent of Public Instruction that the plaintiff was not qualified to perform the duties of a counselor and would be required to obtain a certificate if he was to be hired the next year.

Funding was in doubt for the school year 1979-80, and on May 11, 1979, the district sent the plaintiff a notice of non-renewal for financial reasons.

When the plaintiff completed his duties for 1978-79, he enrolled in Eastern Washington University graduate school. He completed the requirements for a guidance and counseling certificate and Master's Degree on August 3, 1979, and a recommendation for his certification was sent by the university to the state superintendent. A copy of this recommendation was delivered to the school district's grant administrator on or before August 10, 1979.

There was evidence that the state superintendent routinely issues certificates upon the recommendation of

Eastern Washington University, and there was no reasonable ground to doubt that the plaintiff would receive his certificate in due course, when and if he applied for it.

In the meantime, on May 24, 1979, the school district had received word that it would be awarded a grant for a full-time tutor-counselor for the 1979-80 year, with emphasis on counseling.

The plaintiff was told that if he obtained his counselor's certificate he could apply and would be considered for this position, along with other applicants. The district advertised for applicants, stating that "Indian preference" would be granted. The job announcement stated: "Our deepest concern is the ability of the person selected to effectively work with students and parents within our community." The plaintiff was told that he could apply for the position as late as August 10, 1979. On that date he submitted a written request that he be considered for the position.

Nine persons applied for this position. The applicants were screened independently by the grant administrator, the personnel manager, and the executive committee of the Central Valley Native American Advisory Committee, and three were selected for interviews, among them the plaintiff. One of these proved to be unqualified. Six members of the advisory committee's executive committee interviewed the applicants on August 21, 1979.[1] The committee members had been instructed that they were at liberty

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[1]Although there were 21 members of the Central Valley Native American Advisory Committee, most of them did not attend meetings or actively participate in the committee's functions.

to vote for the applicant whom they found to be the best qualified. Four votes were cast for the plaintiff's remaining competitor, Peter Covella, and one vote was cast for the plaintiff. The chairman abstained. The grant administrator and the personnel manager also independently recommended the appointment of Covella, finding him the best qualified applicant. The board accepted these recommendations.

On September 9, 1979, after the interviews, the employment of Covella, and the beginning of the school year, the plaintiff applied for certification. He was issued a counselor's certificate on October 1, 1979.

The claims of the plaintiff in this action were based on alleged improper delegation of authority, violation of the doctrine of *Peters v. South Kitsap School Dist. 402*, 8 Wn. App. 809, 509 P.2d 67 (1973), breach of a collective bargaining agreement, violation of the Indian Self-Determination Act, 25 U.S.C. §§ 450-450m, and violation of the state law against discrimination.

The court ruled against the plaintiff on all of these except the claim based on the federal statute.

It ordered reinstatement of the plaintiff for the 1980-81 year, and granted him special damages of $17,162.41. It denied his claim for general damages under the federal legislation, finding that he had proved none.

The plaintiff has appealed all of the adverse rulings save the one regarding improper delegation of authority, and the school district has cross-appealed from the judgment granting relief under the federal act.

The first question we will examine is whether the district, in choosing the applicant which it found, on the advice of the advisory committee, to be the best

qualified, violated 25 U.S.C. § 450e (b) et seq. (Indian Self-Determination Act) or RCW 49.60.180 (the state law against discrimination).

25 U.S.C. § 450e(b) provides:

> (b) Any contract, subcontract, grant, or subgrant pursuant to this Act, sections 452 to 457 of this title, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible- -
>
> > (1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and
> >
> > (2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

(Pub. L. 93-638, § 7, Jan. 4, 1975, 88 Stat. 2205.)

The plaintiff contends that the grant here, being "for the benefit of Indians", invoked this section.

The plaintiff does not dispute that the position of tutor-counselor was given to a person whose qualifications were reasonably found to be superior to his own. His contention is that, as long as he was qualified for the position, he was entitled to the appointment regardless of the qualifications of others, because he was the only person of Indian heritage applying for the job. This position utilizes the concept of "Indian" preference as it was employed in a directive issued by the Commissioner of Indian Affairs in June 1972, pur-

suant to 25 U.S.C. § 472.[2] The constitutionality of this directive, and the statute which it implemented was challenged before the United States Supreme Court in *Morton v. Mancari*, 417 U.S. 535, 541, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974).

The directive stated that the policy of the Bureau of Indian Affairs would be to grant a preference to qualified Indians not only, as before, in the initial hiring stage but also in the situation where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the bureau.

Appellees in that action, who were non-Indian employees of the BIA at Albuquerque, contended that the so-called Indian preference statutes were repealed by the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e (b)) and that they deprived them of property without due process of law, contrary to the Fifth Amendment. They contended that enforcement of the new policy would place them at a disadvantage in competing for promotion and training programs with Indian employees, thus subjecting them to discrimination and denying them equal employment opportunities.

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[2] 25 U.S.C. § 472 (1970) provides:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

The Court of Appeals had held that the 1972 act worked an implied repeal of the Indian preference statutes. The United States Supreme Court reversed. It noted that the federal policy of giving preference to Indians *in the Indian service* dates back as far as 1834 and has as its purpose to "give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." (Footnotes omitted.) *Morton* , at 541-42. The overriding purpose of the 1934 act, the court said, was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically. One of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the particiaption of tribal Indians in the BIA operations. In order to achieve this, the court said, it was recognized that "some kind of preference and exemption from otherwise prevailing civil service requirements was necessary." *Morton*, at 543. The goal of the Congress was to effect the gradual replacement of non-Indians with Indians within the bureau. Displacement of non-Indians was an inevitable concomitant. The court held that this strong legislative policy, enunciated in specific legislation, survived the enactment of the Equal Employment Opportunity Act of 1972. It noted that Title VII of the Civil Rights Act of 1964, 78 Stat. 253 was the first major piece of federal legislation prohibiting discrimination in private employment, 42 U.S.C. § 2000e-2(a). 42 U.S.C. § 2000e(b) expressly excluded "an Indian Tribe" from the act's definition of an "employer".

Section 2000e-2(i) reads:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

The court said that this exemption revealed a clear congressional recognition of the "unique legal status of tribal and reservation-based activities." *Morton*, at 546. The exemptions, it said, revealed a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed. When the Congress extended the general anti-discrimination machinery to federal employment in 1972, it in no way modified the private employment preferences provided for in the 1964 act, and it would be anomalous to conclude that they were not intended to be equally available when the employer was the federal government. Furthermore, the court noted that 3 months after Congress passed the 1972 amendments, it enacted two new Indian laws, requiring that Indians be given preference in government programs for training teachers of Indian children, and that the act evidenced no affirmative intent to erase the preferences that previously had coexisted with anti-discrimination laws. The court found that the two acts were reconcilable, the Indian preference statute being a specific provision applying to a very specific situation and not out of harmony with the anti-discrimination law.

Turning to the claim of denial of due process, the court said that resolution of the issue turned on the

> unique legal status of Indian tribes under federal

> law and upon the plenary power of Congress...to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn...from the Constitution [and] provides Congress with the power to "regulate Commerce...with the Indian Tribes," and...to make treaties.

Morton, at 551-52. The court said that literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA single out for special treatment a constituency of tribal Indians living on or near reservations. The court refused to characterize the preference as a racial one. Rather, it said, the preference was an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It was directed to participation by the governed in the governing agency.

> The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. . . .In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*. Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

(Footnote omitted.) *Morton*, at 554. The court concluded that the preference was reasonable, as applied there, and rationally designed to further Indian self-government and was therefore not a violation of due process.

We have discussed this case at some length because it affords the most significant guide available to us in approaching the plaintiff's contentions with respect to Indian preference and racial discrimination. Two other federal cases dealing with problems of Indian preference are cited in *Morton v. Mancari, supra.* They are *Freeman v. Morton,* 499 F.2d 494 (D.C. Cir. 1974), holding that 25 U.S.C. § 472 (the same statute involved in *Morton*) required that preference be given to Indians in making promotions and lateral transfers, and *Mescalero Apache Tribe v. Hickel,* 432 F.2d 956 (10th Cir. 1970), *cert. denied,* 401 U.S. 981, 28 L. Ed. 2d 333, 91 S. Ct. 1195 (1971), holding this statute inapplicable to reductions in force. The opinion in the latter case reveals that the Bureau of Indian Affairs has not always ascribed an inflexible meaning to the term "Indian preference". There the BIA had, by regulation, adopted a policy of according Indian preference where there were reductions in force, but only when Indians and non-Indians were in the *same* tenure subgroup. In other words, an Indian employee was not given preference over a non-Indian having greater tenure.

In none of these cases was the meaning of the term "Indian preference" explored. While it is evident that in the cases involving employment in the Bureau of Indian Affairs, the term was understood to mean that if an Indian met the minimum qualifications for a position, he must be given preference over non-Indians, regardless of how well qualified, it must be kept in mind

that the United States Supreme Court's approval of that preference was confined to the unique setting of the bureau itself, or of Indian activities on or near reservations. It recognized that were it to be applied outside those settings, a serious question of racial discrimination would arise. Furthermore, the courts decided these three cases under a statute worded differently from 25 U.S.C. § 450e (b). 25 U.S.C. § 472 makes no allowance for discretion in the granting of preferences, but rather provides that "[s]uch qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

25 U.S.C. § 450e(b), on the other hand, provides that contracts, subcontracts, grants, and subgrants shall require "to the greatest extent feasible" preferences shall be given. It seems obvious to us that this provision permits a recipient of a grant, in determining whether the awarding of a preference is feasible, to take into account other conditions of the grant.

Here, one of the express conditions of the grant was that the school district utilize the best available talent and resources. The purpose of the grant was to improve the learning abilities and opportunities of Indian children. Nowhere in the act authorizing the grant did Congress express a finding that this service could best be rendered by persons of Indian heritage, irrespective of their training, experience and other capabilities.

The preference provided for in the Indian Self-Determination Act is accorded not only where a grant is made to Indian organizations, but also where it is made "for the benefit of Indians." 25 U.S.C. § 450e(b). If this phrase is read to mean that where, as here, a grant is made for the benefit of one group of Indians (Indian

children), a preference must be granted to another group (Indian teachers), it will defeat one of the most important conditions of the grant-the utilization of the best talents and resources available. We do not conceive this to have been the congressional intent. Moreover, this preference provision in 25 U.S.C. § 450e(b) is a general law. It applies to contracts, and grants generally, whereas 20 U.S.C. §§ 24laa-ff is a special law, providing for grants for specific purposes and upon specified conditions. The rule that the specific must control the general applies here. *State v. Adlington-Kelly*, 95 Wn.2d 917, 631 P.2d 954 (1981).

Furthermore, the grant itself contained no provision requiring the school district to prefer Indian applicants over better qualified non-Indians. The United States Supreme Court has recently held that a grant is a contract, and the federal government cannot impose conditions which are not set forth unambiguously in the grant itself. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981). Had this grant contained a condition that the school district award preference to Indians over better qualified non-Indians, the conflict with the requirement that the district utilize the best talents and resources available would have been obvious.

Here, the district, with the apparent concurrence of the Superintendent of Public Instruction, sought to give effect to the right of Indian preference, while still adhering to its commitment to utilize the best talents and resources available, by restricting the preference to instances where an Indian and a non-Indian were equally qualified. This, it appears to this court, is the best it could do consistent with its duties under the grant and its obligations as administrator of the schools within

the district.

It also avoids the specter of racial discrimination which the United States Supreme Court has indicated would arise if the BIA concept of Indian preference were applied outside the "unique setting" of that bureau and Indian reservation environs.

We conclude therefore that the trial court erred in holding that the plaintiff was entitled to be given preference over a better qualified applicant in filling this position.

We turn next to the issues involving state law.

The hiring of certificated personnel in this state is governed by statutes and regulations. RCW 28A.67.070 provides:

> No teacher. . .or other certificated employee, holding a position as such with a school district,. . .shall be employed. . .unless he is the holder of an effective teacher's certificate or other certificate required by law or the state board of education for the position for which the employee is employed.[3]

RCW 28A. 70.005 declares that the state board of education shall establish, publish and enforce rules and regulations determining eligibility for and certification of personnel employed in the common schools of this state, including certification under certificates or per-

---

[3]In *Champion v. Shorline School Dist. 412*, 81 Wn. 2d 672, 504 P. 2d 304 (1972), we held that the words "other certificate", as used in this section, refer to certificates, in addition to a teaching certificate, required of one who is certified as a teacher. The respondent falls within that category, being required to have both a teaching certificate and a counselor's certificate in order to perform the duties of the position for which he applied.

mits as the board shall deem proper or as otherwise prescribed by law. This provision gives the board authority to require more than one certificate for a given position, and it is the evident intent that the prescribed certificates must be held by anyone hired for that position.

Under WAC 180-79-125, counselors fall within the category of educational staff associates. This section sets forth the educational requirements for certification. Other provisions pertaining to requirements for certification include WAC 180-79-130(1), 180-79-170(1), and 180-79-180.

In *Kimball v. School Dist. 122*, 23 Wash. 520, 63 P. 213 (1900), this court reversed a jury verdict in favor of a plaintiff who sued for breach of a written contract to hire her as a teacher for the school year. The statute in effect at that time required a teaching certificate, as does the present law. The evidence showed that the plaintiff had held a 1-year certificate which expired in August preceding the beginning of the school year. She failed to pass the examination for a renewal, but did succeed in obtaining a temporary certificate, good for 2 months. When she presented herself with this certificate, the directors of the school district refused to hire her. This court held that it was incumbent upon the plaintiff to prove that at the time she offered to teach, she was duly licensed to teach for the full term of 9 months. It said that if the plaintiff had been allowed to enter upon the discharge of her contract, had taught 2 months and had failed to get a new certificate, she could have recovered for that period, not on the contract, however, but because an implied contract arose as to the 2 months. This court said:

> As a condition precedent to the plaintiff's right of recovery in this action, she should have shown that when she offered her services to the appellants she was qualified to teach, under the laws of this state, for the full nine months contracted for.

Kimball, at 528.

And in *Kester v. School Dist. 34*, 48 Wash. 486, 93 P. 907 (1908), also a suit upon a written contract to teach, it was held that the plaintiff was unqualified to perform the duties required under the contract because he held no certificate or other authority to teach at the time he presented himself and offered to enter upon the performance of his duties. He did have in his possession a letter from a county superintendent stating that his papers were sufficient to entitle him to a temporary certificate, and that such certificate would be granted upon application as provided by statute.

This court held that such a letter was not the equivalent of a temporary certificate. It said:

> Where a certificate is required as a condition precedent to the right to enter upon an employment or exercise a privilege, a promise to grant the certificate on application will not satisfy the requirements of the law.

Kester, at 488.

Kimball v. School Dist. 122, *supra* was cited with approval in *Sherwood v. Wise*, 132 Wash. 295, 232 P. 309 (1925), where this court held that an assignee of an unlicensed architect could not recover for services rendered pursuant to contract, the contract being illegal and void.

Since in each of these cases the applicant did not have

a certificate at the time for performing the contract, the court did not consider what the effect would be if an applicant were to obtain a certificate before the time for commencing his teaching duties. Upon this subject there is a split of authority, some cases holding that where the teacher does not possess the requisite license or certificate at the time the contract for services is entered into, the fact that he subsequently obtains it is of no avail, unless a new contract, express or implied, is thereafter entered into between the parties. Others hold that it is sufficient where the teacher obtains a certificate before he enters on the term of his employment, or before the time for the commencement of his duties. 78 C.J.S. *Schools & School Districts* § 161 (b) (1952); 68 Am. Jur. 2d *Schools* § 140 (1973); Annot., *Failure to procure occupational or business license or permit as affecting validity or enforceability of contract*, 30 A.L.R. 834, 890, 894-98 (1924); 118 A.L.R. 646, 666-67 (1939).

The trial court here recognized that the plaintiff did not have the required certification at the time this appointment was made or before the beginning of the school year. However, it concluded that because the director of the program allowed the plaintiff to apply for the position and the board, the advisory committee, and school officials considered his application, the defendant was estopped to assert the statutory requirement.

An examination of the plaintiff's testimony reveals that he was aware of the statutory requirement and of the insistence on the part of the Superintendent of Public Instruction that he procure such a certificate if he was to be hired for the year 1979-80. He testified, nevertheless, that the administrator of the grant told him that the document which he had obtained from

Eastern Washington University recommending to the Superintendent of Public Instruction that he be certified as a counselor was a sufficient qualification for the school district to accept his application for the position. Nowhere in his testimony do we find any assertion that the administrator or other employee or official of the district promised him that he would be hired. The evidence is that he was told that they would be looking for the best qualified person.

In order to establish estoppel, it must be shown that the defendent made an admission, statement or act which was inconsistent with his later claim; that the plaintiff relied thereon; and that the plaintiff would suffer injury were the defendent allowed to contradict or repudiate his earlier admission, statement, or act. *Harbor Air Serv., Inc. v. Board of Tax Appeals*, 88 Wn. 2d 359, 560 P. 2d 1145 (1977); *Finch v. Matthews*, 74 Wn. 2d 161, 443 P. 2d 833 (1968).

While the doctrine may, in a proper case, be applied to a municipal corporation such as a school district, it cannot operate where the act of the municipal corporation is ultra vires and void. In determining what acts fall within this category, the court must distinguish those acts which are done wholly without legal authorization or in direct violation of existing statutes, from those acts which are within the scope of the broad governmental powers conferred, granted or delegated, but which powers have been exercised in an irregular manner or through unauthorized procedural means. *Finch v. Matthews, supra. Accord, State ex rel. Shannon v. Sponburgh*, 66 Wn. 2d 135, 401 P. 2d 635 (1965).

As we have seen, a school district has no authority to hire a person for a certificated position unless that per-

son holds the required certificate. The doctrine of equitable estoppel cannot operate to defeat that statutory requirement. However, as we understand the trial court's decision, it did not hold that the plaintiff could have assumed the duties of the position without first obtaining a counselor's certificate, but rather that the district, through its agents, had, by permitting him to apply before he obtained the certificate, estopped themselves from asserting that he would not have been qualified when the term began. The evidence was that the certificate could have been obtained within 20 days after application was made. On the day of the interview, only 15 days remained before the opening of school. However, for purposes of this opinion, we will assume that, had the plaintiff been accepted for the position, he would have immediately applied for a certificate and would have obtained it prior to the beginning of the school year. We find it unnecessary to decide whether the doctrine of equitable estoppel can properly operate in these circumstances and, for purposes of this opinion, will assume that it can.

Even so, the fact that the plaintiff would have been properly certified on the day his duties commenced, had he been hired, does not entitle him to the benefit of the doctrine of *Peters v. South Kitsap School Dist. 402*, 8 Wn. App. 809, 509 P. 2d 67 (1973). In *Peters*, the Court of Appeals, Division Two, said that where a teacher is nonrenewed for financial reasons, he must be offered any job for which he is qualified, which becomes available before "termination of his contract." Implicit in that opinion is a requirement that the teacher be in good standing, that is, fully certified at the time of the nonrenewal and qualified for the position at the time

the opening occurs. The plaintiff met neither of those requirements.

Under the plaintiff's contract for the year 1978-79, he was employed for one "school year". RCW 28A.01.020 declares that the school year shall begin on the 1st day of September and end on the last day of August. Nevertheless, the school district maintains that the school year, for purposes of the *Peters* doctrine, should terminate on the day that a teacher completes 108.5 days of service, as is provided in the collective bargaining agreement. We need not resolve that question in this action.

The plaintiff did not have the required counselor's certificate at the time he was nonrenewed nor on the last day of August 1979, and was therefore not qualified for the position within the duration of his contract, assuming it terminated on August 31 rather than in June, as the plaintiff argues. Consequently, he was not entitled to the benefit of the *Peters* rule. Since this disposes of the plaintiff's claim that the *Peters* doctrine was violated, it is unnecessary to inquire into the significance of the plaintiff's signing a waiver of continuing contract rights, or the question whether *Peters* applies to the termination of a contract financed by federal grant and subject to federal statutory and regulatory requirements, as is the case here, a significant requirement being that the school district utilize the best available talents and resources.

The collective bargaining contract relied upon by the plaintiff in another of his theories of recovery requires that the district shall

> in all instances employ certificated employees who are properly credentialed in accordance with

> applicable state laws, Washington Administrative Code, and by other such requirements as specified by the office of the State Superintendent of Public Instruction.

Article 5, section F of the contract provides a procedure to be followed when, in the judgment of the board, a reduction in staff is necessary. Employees nonrenewed because of a reduction in staff, under this provision, are to be placed in an "employment pool" available for reemployment for any positions which become available and for which they qualify until all of the employees have been rehired. The benefits of this provision are afforded only to persons holding the "proper certificate". The plaintiff, not holding the proper certificate at the time he was nonrenewed or when the position became available, cannot claim relief under this contract section. As in the case of the *Peters* doctrine, the fact that he would have had a certificate on the day school began is not sufficient to satisfy its requirements.

We also note, as did the trial court, that section F by its terms applies only where there is a multiple reduction in force and does not purport to apply to isolated nonrenewals.

There remains the question of whether RCW 49.60.180 was violated. That section makes it an unfair practice for any employer to refuse to hire any person because of such person's race or national origin, unless based upon a bona fide occupational qualification. There is no evidence that the plaintiff was denied this position because of his race. All the evidence was that the district chose the person having the most impressive qualifications, and that it made the appointment with the approval of the Central Valley Native

American Advisory Committee. The superior court correctly dismissed this claim for relief.

The judgment in favor of the plaintiff is reversed. Insofar as it rejected the claims of the plaintiff, the judgment is affirmed.

/S/ Rosellini, J.

WE CONCUR:

APPENDIX "B"

THE SUPREME COURT OF WASHINGTON

WILLIAM S. JOHNSON,

Appellant,

v.

CENTRAL VALLEY SCHOOL DISTRICT NO. 356,

Respondent.

No. 48293-4

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having unanimously decided that the appellant's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 17th day of August, 1982.

/S/ Robert F. Brachtenbach
Chief Justice

APPENDIX "C"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM S. JOHNSON,

Appellant,

v.

CENTRAL VALLEY SCHOOL DISTRICT NO. 356

Respondent.

MANDATE

No. 48293-4

Spokane County No. 792059875

The State of Washington to: The Superior Court of the State of Washington in and for Spokane County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on June 3, 1982, became the decision terminating review of this court in the above entitled case on August 17, 1982. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $244.22 in favor of respondent and against appellant.

An Order Denying Motion For Reconsideration was entered August 17, 1982; copy attached.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 18th day of August, 1982.

Reginald N. Shriver
Acting Clerk of the Supreme Court
State of Washington

CC:
POWELL & HARNETIAUX
Mr. Bryan P. Harnetiaux
WINSTON & CASHATT
Mr. Robert W. Winston, Jr.
Mr. Charles M. Anderson
REPORTER OF DECISIONS

[Seal]

cl
Attachment

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FILED
DEC 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-778

In The Supreme Court
OF THE
United States

October Term, 1982

WILLIAM S. JOHNSON,
Petitioner,

vs.

CENTRAL VALLEY SCHOOL
DISTRICT NO. 356,
Respondent

TO THE SUPREME COURT
OF THE STATE OF WASHINGTON
ON PETITION FOR A
WRIT OF CERTIORIAI

BRIEF IN OPPOSITION TO PETITION

ROBERT W. WINSTON, JR.
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QUESTIONS PRESENTED FOR REVIEW

1. Does the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e (b) (1), create a substantive right in an individual Native American, who does not hold state mandated credentials, to demand employment with a Washington state school because the School District is a recipient of a federal grant appropriated under 20 U.S.C. § 241 to assist Indian students?

2. If such a right exists, to be applicable, must it clearly be made a condition of the terms of the grant as required by this Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)?

3. If such a right exists, may a Native American, without the benefit of joinder of the United States, pursue a private claim under 25 U.S.C. § 450e(b) (1) in a state court?

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OBJECTION TO JURISDICTION

Petitioner asserts his claim under 28 U.S.C. §1257 (3). Respondent objects to the claimed basis of jurisidiction. The specifics of Petitioner's assertion of authority to seek review are not set forth in the grounds for jurisdiction. It is assumed Petitioner claims a *substantive right* has been created by the Indian Self-Determination and Education Assistance Act ("Indian Self-Determination Act")' 25 U.S.C. §450e (b) (1), which provides as follows:

> "(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934, as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible--
>
> > "(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians;..."

Pub. L. 93-638, §7, Jan. 4, 1975, 88 Stat. 2205. The Act has not been interpreted to grant to an individual a substantive right to pursue a private claim should he/she feel aggrieved. The statute only requires that to the "greatest extent feasible" preference will be given to Native Americans in the expenditure of federal funds to benefit Indians. The format of the Indian Self-Determination Act is very similar to the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §6000, *et seq.*, as discussed in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). Applying the tests of *Pennhurst, supra*, it cannot be said that by the use of the language "greatest extent feasible" Congress intended to impose the obligation upon the states to hire an otherwise unqualified individual because of his/her status as a Native American

For that reason, Respondent objects to Petitioner's claim that there is jurisdiction to raise his claim before this court.

APPLICABLE STATUTES AND REGULATIONS

20 U.S.C. §241dd provides in relevant sections:

> **Applications for grants; conditions for approval; reports; amendments**
>
> ...
>
> "(b) An application by a local educational agency or agencies for a grant under this subchapter may be approved only if it is consistent with the applicable provisions of the subchapter and--
>
> "(1) meets the requirement set forth in subsection (a) of this section;
>
> "(2) provides that the program or project for which application is made--
>
> "(A) will utilize the best available talents and resources (including persons from the Indian community) and will substantially increase the educational opportunities of Indian children in the area to be served by the applicant; and
>
> "(B) has been developed--
>
> "(i) in open consultation with parents of Indian children (including persons acting *in loco parentis* other than school administrators or officials), teachers, and where applicable, secondary school students, including public hearings at which such persons have had full opportunity to understand the program for which assistance is being sought and to offer recommendations thereon, and

"(ii) with the participation and approval of a committee composed of, and selected by, parents of children participating in the program (including persons acting *in loco parentis* other than school administrators or officials), for which assistance is sought, teachers, and, where applicable, secondary school students of which at least half the members shall be such parents;

"(C) sets forth such policies and procedures, including policies and procedures relating to the hiring of personnel, as will insure that the program for which assistance is sought will be operated and evaluated in consultation with, and the involvement of, parents of the children and representatives of the area to be served, including the committee established for the purposes of clause (2) (B) (ii);

"(3) provides that the parent committee formed pursuant to paragraph (2) (B) (ii) will adopt and abide by reasonable by-laws for the conduct of the program for which assistance is sought."

Pub. L. 92-318, Title IV, as amended November 1, 1978, Pub. L. 95-561, Title XI, §1144, 92 Stat. 2329.

20 U.S.C. §3403 provides:

Relationships with States

Rights of local governments and educational institutions

"(a) It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and

to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States."

Curriculum, administration and personnel; library resources

"(b) No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to excerise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over an accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law."

Pub. L. 96-88, Title I, §103, Oct. 17, 1979, 93 Stat. 670.

25 U.S.C. §450n provides:

Sovereign immunity and trusteeship rights unaffected

"Nothing in this Act shall be construed as--

"(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

"(2) authorizing or requiring the termination of any existing trust responsibility of the

United States with respect to the Indian people."

Pub. L. 93-638, Title I, §110, Jan. 4, 1975, 88 Stat. 2213.

The Revised Code of Washington (RCW) 28A.67.070 provides in part:

Conditions and contracts of employment--Determination of probable cause for nonrenewal of contracts--Notice--Opportunity for hearing

"No teacher, principal, supervisor, superintendent, or other certificated employee, holding a position as such with a school district, hereinafter referred to as 'employee', shall be employed except by written order of a majority of the directors of the district at a regular or special meeting thereof, nor unless he is the holder of an effective teacher's certificate or other certificate required by law or the state board of education for the position for which the employee is employed."

45 C.F.R. §186.13 provides as follows:

Approval of applications.

"(a) *In general.* An application may be approved only if it is consistent with the applicable provisions of the act and this part and meets the requirements set forth in §186.12 and in this section.

"(b) *Utilization of talents; increase of educational opportunities.* An application shall provide satisfactory assurance that the program or project for which the application is made:

"(1) Will utilize the best available talent and resources (including persons from the Indian community), and

"(2) Will substantially increase educational opportunities of Indian children in the area to be served by the applicant.

"The talents and resources utilized to substantially increase educational opportunities of Indian children may include any individuals or organizations which have a particular and uncommon skill, ability, or delivery system, based on knowledge, assets, or existing capacities, to increase educational opportunities of Indian children. Educational opportunities may include, but shall not be limited to, instructional and supportive activities, services or experiences designed to meet the assessed needs of Indian children to be served in the application.

"20 U.S.C. 241dd (b) (2) (A))

"(c) *Consultation and hearings.* An application shall provide satisfactory assurance that the program or project for which application is made has been developed:

"(1) In open consultation with parents of Indian children, teachers, and, where such programs or project will serve secondary school students, Indian secondary students, including not less than one public hearing at which such persons have been given a full opportunity to understand the program for which assistance is sought and to offer recommendations thereon; and

"(2) With the participation and approval of a committee selected in accordance with §§186.15 and 186.16. Such assurance shall include at the minimum a description of the steps taken by the applicant to meet the requirements of this paragraph.

"(20 U.S.C. 241dd (b) (2) (B))"

COUNTERSTATEMENT OF THE CASE

Petitioner did not fairly summarize the facts in this case. Respondent, Central Valley School District, applied for and received a federal grant to assist in the educational development of Native American children for the 1977-78 school year. The grant was issued under the terms of the "Financial Assistance to Local Educational Agencies for Education of Indian Children", 20 U.S.C. §241aa, *et seq.* The federal regulations governing the terms of the grant appear at 45 C.F.R. §186, *et seq.*

As required by law, an advisory committee composed of Native American parents was established to assist in the administration of the grant. The committee of parents, in conjunction with the School District, determined that Native American students in the community would best be served by hiring a tutor-counselor to assist the children educationally as well as with their unique problems.

As shown in the trial court's Findings of Fact (Appendix "A"), Mr. Johnson was hired for the 1977-78 school year by the School District, upon advice from the parent committee, for the half-time position. Mr. Johnson possessed neither a teaching certificate nor a counseling certificate as required by the laws of the State of Washington. (Finding III, A.-2) An expressed condition of his employment was that he would obtain both certificates. Prior to the 1978-79 school year, Mr. Johnson did obtain a teaching certificate, but did not earn his counseling certificate. He was re-employed for the 1978-79 year, the contract being increased to three-quarters time due to additional funding.

During the 1978-79 school year, the School District was advised of two critical facts. One, federal funding for the next school year would be increased to allow employment of a full-time employee. The School District, in conjunction with the parents, determined that greater emphasis would be placed on counseling services to the students. Second, the School District was advised by the State Superintendent of Public Instruction's Office that federal funding for the grant would be jeopardized if Mr. Johnson, who lacked a counseling certificate, continued in the position. (Ex. 21. RP 173, appearing *in toto* in Appendix "B". See also Findings IX, A.-4) Mr. Johnson was terminated properly by the statutory procedure. He was also advised that should he obtain a counseling certificate he could apply for and would be considered in the same manner as all other applicants.

The position was advertised with the following statement:

> "All candidates should have applications completed and in the Central Valley School District Office no later than August 1, 1979. A valid Washington State Teaching Certificate as well as a Counseling Certificate is required. A placement file must be requested by the applicant. Indian preference will be granted..." (Ex. 12, RP 23,77)

Mr. Johnson was allowed to submit his application on August 10, 1979, after the final application date. Although the record shows Mr. Johnson had completed the requisite course work during the summer, he did not possess a counseling certificate as of that date, at the date of the interview, or on the first day of school. He was the only Native American applicant.

The parent committee conducted interviews. Mr. Covella, the candidate with the acknowledged superior qualifications and the only applicant with a counseling certificate, was recommended for hire. The School District concurred and Mr. Covella was hired.

Mr. Johnson sued alleging four claims arising under state law. Shortly before trial, the Complaint was amended to include a substantive claim under 25 U.S.C. §450e (b) (1). The School District's motions to dismiss the claim for lack of subject matter jurisdiction, failure to state a claim, failure to join the United States as a necessary party, and failure to exhaust administrative remedies were denied. The only claim upon which Petitioner prevailed after trial was the denial of the preference in hiring which the trial court found to be required by 25 U.S.C. §450e (b) (1). (Conclusion VIII, A. 15)

Contrary to Petitioner's assertion, the Washington Supreme Court ruled that he lacked certification to claim entitlement to employment under state law and that the trial court improperly applied the preference provision. Each of the defenses to the claim asserted before the trial court were raised before the Washington Supreme Court, but the case was resolved on other grounds. The judgment for Mr. Johnson was reversed.

SUMMARY OF ARGUMENT

This Court should deny the Petition because there is no substantive basis upon which Petitioner may claim jurisdiction for review. Additional grounds for denying review are that the Washington Supreme Court's decision may be affirmed on independent state grounds since it mandates minimal certification for employees. The Washington Supreme Court's decision should be sustained based upon this Court's ruling in *Pennhurst supra.* Petitioner's reliance upon *Morton v. Mancari,* 417 U.S. 535 (1974), and *Mescalero Apache Tribe v. Hickel,* 432 F. 2d 956 (10th Cir. 1970), cert. denied, 401 U.S. 981 (1971), strains a fair reading of each case and does not provide a basis for reversing the Washington Supreme Court's decision. To allow relief would conflict with controlling legislation funding the grant, 20 U.S.C. §241dd, which requires parental input in selection of the "best resource available". In addition, should a claim exist, Petitioner has failed to exhaust the appropriate administrative remedies of the grant process. Not addressed by the Washington Supreme Court, but raised on appeal, is the question of whether a claim of this nature can properly be brought in a state court. If this Court were to find that a substantive right was created for Native Americans, the private action should only be allowed in a federal court which has exclusive jurisdiction with regard to Indian claims and a necessary party to such litigation is the United States.

ARGUMENT

Petitioner's claimed substantive right to pursue a private action has been discussed as an objection to assumption of jurisdiction.

The Washington Supreme Court should be sustained and the Petition dismissed since the opinion by the Court rests on an adequate state basis. *Wilson v. Loew's Incorporated*, 355 U.S. 597 (1958) Despite protest in a footnote at page eight of the Petition, the Washington Supreme Court did follow its precedent of interpreting the law of the State as requiring the holding of the required certificate as a prerequisite to employment in the educational system. As the court stated concerning the state claims in *Johnson v. Central Valley School Dist.* , 97 Wn. 2d 419, 433,654, P. 2d 1088 (1982):

> "As we have seen, a school district has no authority to hire a person for a certificated position unless that person holds the required certificate. The doctrine of equitable estoppel cannot operate to defeat that statutory requirement. However, as we understand the trial court's decision, it did not hold that the plaintiff could have assumed the duties of the position without first obtaining a counselor's certificate, but rather that the district, through its agents, had, by permitting him to apply before he obtained the certificate, estopped themselves from asserting that he would not have been qualified when the term began. The evidence was that the certificate could have been obtained within 20 days after application was made. On the day of the interview, only 15 days remained before the opening of school. However, for purposes of this opinion, we will assume that, had the plaintiff been

> accepted for the position, he would have immediately applied for a certificate and would have obtained it prior to the beginning of the school year. We find it unnecessary to decide whether the doctrine of equitable estoppel can properly operate in these circumstances and, for purposes of this opinion, will assume that it can."

The undisputed testimony is that Mr. Johnson did not possess the appropriate certificate. Mr. Johnson alleged and the trial court ruled that the School District was estopped from relying on certification as a defense. However, the federal grant was placed in jeopardy because Mr. Johnson lacked certification. (Appendix "B") The federal legislation creating the Department of Education, which oversaw the grant during the 1979-80 school year, provides there shall be no federal intrusion in the State's determination of academic certification of personnel. 20 U.S.C. §3403 Granting Mr. Johnson's relief will require this Court to reverse the law of the State of Washington which requires all educational employees to hold the required certification to be minimally qualified. RCW 28A.67.070

Should there be jurisdiction to bring this claim under 28 U.S.C. §1257 (3), this Court should look to its recent decision in *Pennhurst, supra,* to deny the Petition. Mr. Johnson's claim is created by his status in relationship to the Indian Self-Determination Act. The School District contends that the statute does not create a new right. At best, the statute creates a legislatively defined contractual term as recognized in *Pennhurst, supra.* Relief for violation of a contractual term is contained within the legislative scheme and implementing regulations governing the grant.

Assuming *arguendo,* the Indian Self-Determination Act applies to the School District's grant, then an

administrative appeal exists through the Grant Appeals Board, 20 U.S.C. §1234, *et seq.*, with regulations found at 45 C.F.R. §16. Petitioner's remedy was to bring the matter to the attention of the Office of Indian Education within the Department of Education. At that juncture, the Office of Indian Education would have had a number of options available such as a complaint to cease and desist, negotiations between the parties and a withholding of funding. 20 U.S.C. §1234 (a), (b) and (c) Also, any grant subject to the terms of the Indian Self-Determination Act may be rescinded for violation of rights by the Secretary of Education. 25 U.S.C. §450m The Grant Appeals Board's determination can be appealed administratively with an ultimate appeal to the United States Court of Appeals. 20 U.S.C. §1234 (d) The record demonstrates this procedure was not followed by Mr. Johnson. (RP 193)

The Petition should also fail because to allow this claim would conflict with the federal legislation which funded the School District's program. In *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980), this Court ruled granting preferential treatment to Native Americans cannot be read in derogation of other co-existing legislation. The intention of the grant to the School District was not to hire and grant job security to Native American teachers. Rather the clear congressional intent of the grant to the School District was that a program to assist Native American students be developed with the participation and approval of a parental committee. 20 U.S.C. §241dd(b) The parents are at liberty to utilize the best available resource. 20 U.S.C. §241dd (b) (2) (A)

Petitioner's argument operates in derogation of the Indian Self-Determination Act. It is the purpose of the Act to provide the widest participation of Native

Americans in programs for their benefit. The parents declined, after having two years exposure to Mr. Johnson, to recommend Petitioner to the School District. Reading the two statutes so as to co-exist should give preferential treatment to the decisions of the Native American parents. To allow your Petitioner to demand employment as a matter of right would completely negate the effective input of the parent committee as required by 20 U.S.C. §241dd(b) (2) (B) and 45 C.F.R. §186.13(c).

The School District moved prior to trial to join the United States as a necessary party. (Supp. CP 52) The Office of Indian Education in the Department of Education is responsible for administering the grant program. Failure to join the United States exposed the Respondent to inconsistent obligations to the parent committee, to the State of Washington, to Petitioner and to the federal government. An action involving the United States, however, should have been commenced in federal court as there has been no waiver of sovereign immunity with regard to claims by Native Americans under the Indian Self-Determination Act. 25 U.S.C. §450n

Petitioner argues as his initial ground for granting certiorari that the Washington Supreme Court's interpretation of "greatest extent feasible" permitting the School District to select the best qualified applicant, renders meaningless a concept of preference. It is respectfully suggested that such is not a fair reading of the court's opinion. The decisions in *Morton v. Mancari, supra, Mescalero Apache Tribe v. Hickel, supra,* and the applicable statutory scheme likewise do not suggest Petitioner's version of preference. 20 U.S.C. §241dd(b) provides:

"(b) An application by a local educational agency or agencies for a grant under another subchapter may be approved only if it is consistent with the applicable provisions of the subchapter and--"

...

"(2) provides the program or project for which application is made--

"(A) *will utilize the best available talents and resources (including persons from the Indian community) and will substantially increase the educational opportunities of Indian children in the area served by the applicant;...*"
(emphasis added)

The mandate to the parent committee and the School District was to use the best available resource. Absent the question of certification, the parents had been instructed that preference was to be considered when candidates had equal qualifications (Finding of Fact XV, A.-6) The parents had an obligation to determine the needs of the children and the best resource to fulfill that need. They recommended Mr. Covella as the individual to best serve the needs of the students. Given the facts of this case, the broad reading of *Morton v. Mancari, supra,* suggested by Mr. Johnson is not warranted. The authority cited by petitioner would not require the School District to hire a Native American in the face of a contrary recommendation by the Native American parents who are required to participate in administration of the grant.

Petitioner also seeks to distinguish this Court's ruling in *Pennhurst, supra,* by placing great reliance on a letter from the HEW Division Director of the Office of Indian Education. Petitioner believes the letter requires his definition of Indian preference. The "Hakim Kahn" letter[1] does not "specifically warn," as

[1]The Hakim Kahn letter (Ex. 18) in part states:

"(6) *Question:* May Section 7 (b) of P.L. 93-638, the Indian Self-Determination and Education Assistance Act, be read to mean that an Indian job applicant who meets requirements for a position funded under Part A, as set out in the applicable job description, must be offered the position ahead of a qualified non-Indian applicant?

"*Answer:* Yes, this is a permissible reading of the Indian preference provision. Section 7(b) of P.L. 93-638 provides in relevant part as follows:

"Any contract, subcontract, grant or subgrant pursuant to this Act, the Act of April 16, 1943 (48 Stat. 596) as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians shall require that *to the greatest extent feasible--*'

"(1) preference and opportunities for training employment in connection with the administration of such contracts or grants shall be given to Indians. (Emphasis added)

"The Act does not provide further guidance as to the effect of this provision, and the legislative history of the Act does not clarify its meaning. There are no regulations which implement it as applied to Part A grants. Given the broad language of the Act and the phrase 'to the greatest extent feasible' however, an interpretation which looks to the appropriate job description to ascertain minimal qualifications for the position is permissible, although not required. Such an interpretation would mean that where an Indian meets the minimal requirements of the position, he or she must be offered it ahead of a non-Indian who may be more qualified in the terms of education, experience, and like factors. Interpretation is in accord with the provisions to be included in Federal contracts subject to the Indian preference provision under proposed rules issued by the Department of Interior August 30, 1977. (41 CFR 14-7 50002; 42 Fed. Reg. 43647, 43648.)"

suggested by Petitioner, that a broad reading of Indian preference must be given by grant recipients. (Ex. 18, RP 48, 56) The letter was in response to various questions posed by school disticts with regard to interpretations of 20 U.S.C. §241, *et seq.*, and implementing regulations. The letter first of all indicates that reading the regulation to encompass the Indian Self-Determination Act is permissible and not mandatory. Second, applying the Act requires that the Indian must be minimally qualified which Petitioner cannot assert by operation of state law. Finally, the interpretation is not to be found in the clear language of the funding legislation as required by *Pennhurst, supra.* Nor is the Act made applicable by a provision of the Code of Federal Regulations then in effect governing the grant. (The regulation was amended to include application of the preference provisions of the Indian Self-Determination Act in May 21, 1980, after the grant year in question. Such amendment renders moot much of Petitioner's argument regarding future federal grants and the need for resolution of the question by this Court.) 45 C.F.R. §187, *et seq.*, outlines the regulations implementing the Indian Self-Determination Act and is not referenced in the regulation governing the grant in issue, 45 C.F.R. §186, *et seq.* If there was intended a broader application of Indian preference, to include the School District's grant, it must be clearly stated in the governing law or regulation as required by *Pennhurst, supra,* which is controlling.

The final argument of Petitioner seems to be that this Court on prior occasion has taken the Washington Supreme Court to task for misconstruing the law with regard to Indians, citing, *Washington v. Fishing Vessel*

Assn., 443 U.S. 658 (1979). Petitioner appears to assign a hidden agenda to the decision of the Washington Supreme Court. A fair reading of *Johnson v. Central Valley School Dist., supra,* is that an unqualified teacher may not demand, as a matter of right, employment from a school district in the State of Washington. Mr. Johnson claims employment as a matter of right. A rigorous scheme of certification of educational employees has been established by the law of Washington and that scheme should be protected by this Court.

CONCLUSION

For the reasons outlined above, Respondent respectfully suggest that no pressing question of federal law has been decided by a state court which needs to be resolved by this Court as suggested by Petitioner. Rather, the State should be allowed to speak with regard to what certification it will require as a condition to seeking employment in its educational system. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT W. WINSTON, JR.

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APPENDIX A

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

WILLIAM JOHNSON, Plaintiff, vs. CENTRAL VALLEY SCHOOL DISTRICT NO. 356, Defendant	)	Cause No. 79-2-05987-5

THIS MATTER, having come on regularly before the Honorable Richard P. Guy, sitting without a jury, for trial on July 21 and July 22, 1980, and the plaintiff, William Johnson, being represented by Bryan P. Harnetiaux of Powell & Harnetiaux, and the defendant, Central Valley School District No. 356, being represented by Robert W. Winston, Jr. and Charles Matthew Andersen of Winston & Cashatt, and the Court having conducted trial in this matter and having rendered its oral opinion on July 23, 1980, having heard the respective party's Motion for Reconsideration and having denied the same and being fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

I.

Plaintiff, William Johnson, hereinafter referred to as plaintiff, is a one-quarter degree Montouk Indian of the Brotherton Indian Tribe. Plaintiff is registered as a tribal member with the United States Department of Interior, Bureau of Indian Affairs.

II.

Defendant, Central Valley School District No. 356, ("School District") is a duly organized and authorized school district operating under the laws of the State of Washington, County of Spokane.

III.

In 1977, defendant School District hired plaintiff as a counselor-tutor for Indian students under a federally assisted grant program. This position was for the 1977-78 school year and was half-time in nature. Plaintiff entered into a certificated employee's contract with defendant School District (Exhibit No. 3). Plaintiff did not possess, during the 1977-78 school year, a teaching certificate issued by the State of Washington.

IV.

The position of counselor-tutor for the Indian students was created by defendant School District pursuant to a grant application to the Federal Government in 1977 for the 1977-78 school year. The grant referred to above and the grants for 1978-79 and 1979-80 were all funded under the "Financial Assistant to Local Educational Agencies for Education of Indian Children", Title IV, Public Law 92-318, 20 U.S.C. 241aa, *et seq*. The grant application was made to assist approximately 175 students of Native American ancestry attending the School District's schools. The grant funds were used to create a counselor-tutor position to work with Indian students and the funds were applied towards the benefit of the Native American students. The tutorial and counseling methods were directed towards students at the secondary level, to assist them

in educational, emotional, cultural and social needs peculiar to Native American students.

V.

The School District again applied for and received grant monies for the 1978-79 school year. The grant monies received during that school year were applied towards a counselor-tutor position for Indian students and was three-quarters time in nature. The School District also applied for and received federal funds for the 1979-80 academic year which were applied to the position of counselor-tutor for Indian students. Funding for the 1979-80 school term was sufficient to permit a full-time counselor for Native American students.

VI.

With the inception of the Indian counselor-tutor position in 1977, defendant School District had created an Indian advisory committee entitled the Central Valley Indian Advisory Committee which was composed of parents and guardians of Indian students and staff representatives from the schools. Creation of this committee was a condition of the federal grant. One of the functions of this committee was to monitor the hiring process for filling the position of Indian counselor-tutor and to make recommendations to the defendant School District as to how to fill that position. In the spring and summer of 1979 there were approximately 21 members of such advisory committee.

VII.

As a pre-condition to the grant monies, a Native American Advisory Committee was formed. The advisory committee was formulated under the provisions as

outlined in 20 U.S.C. 241aa, *et. seq.* The committee was composed of parents and teachers of Native American students as well as students of Native American ancestry. The purpose of the committee was to provide meaningful input on the part of the parents of Native American students into the educational development of their children. The functions by the Committee included making recommendations to the defendant School District as to the manner in which the grant funds were to be expended. Another function was to monitor the hiring process for filling the counselor-tutor position and to make recommendations to the School District as to how to fill the position.

VIII.

At the commencement of the 1978-79 school year, plaintiff executed a Certificated Employee's Contract and a waiver (Exhibit Nos. 4 & 28). Prior to the commencement of 1978-79 school year, plaintiff had obtained certification as a teacher in Washington.

IX.

The duties performed by plaintiff during the 1977-78 school year were primarily tutorial in nature but did include some counseling of Indian students. During the 1978-79 school year, the duties embraced counseling to a higher degree than the year before, but they remained primarily tutorial. At the time of his employment in 1977, and again at the time of his renewal in 1978, plaintiff was informed that the nature of his duties involved counseling. Plaintiff was also informed that it would be necessary in the future for him to obtain counseling certification. During the 1978-79

school year, the School District did not require counseling certification. During the 1978-79 school year the Superintendent of Public Instruction of the State of Washington notified the School District and plaintiff (Exhibit No. 21) that plaintiff would be required to obtain a counseling certificate for the 1979-80 school year. At the termination of the 1978-79 contract year, plaintiff had not obtained the counseling certificate.

X.

In June of 1979, defendant School District took steps to publically advertise for the position of Indian counselor-tutor with the District. Job descriptions were circulated to various institutions and other outlets. Such advertisement provided in part: "Indian preference will be granted."

XI.

Prior to May 15, 1979, federal funding for the 1979-80 grant application was uncertain. On May 11, 1979, defendant School District notified plaintiff in writing and orally that he would not be renewed due to financial reasons (Exhibit No. 9). Plaintiff did not appeal.

XII.

At the end of the 1978-79 school year plaintiff enrolled in Eastern Washington University graduate school for the purposes of obtaining his Masters in Guidance and Counseling and Guidance and Counseling certification so that he would be eligible for the position of Indian counselor-tutor if it were refunded for the 1979-80 school year.

XIII.

The Department of HEW sent a letter, dated May 18, 1979, notifying defendant School District that the Indian Educational Assistance grant would be forth coming. The notification of funding was received by defendant School District sometime after May 25, but before the conclusion of the school term on June 12, 1979. The nature of the position for the 1979-80 school year was changed from prior years. It was to be full-time and required a much greater degree of counseling and a counseling certificate.

XIV.

On June 26, 1979, defendant School District took steps to advertise for the position of counselor-tutor for Indian students (Exhibit No. 12). The announcement indicated that "Indian preference" would be given in hiring. The Native American Advisory Committee had recommended to the School District that the job position be left open until August 10, 1979, to afford plaintiff an opportunity to seek qualification and apply for the position. Plaintiff was notified of this. The position remained open for application until August 10, 1979.

XV.

The School District's grant administrator, Neal Prescott, and the assistant superintendent, Charles Stocker, the School District's affirmative action supervisor, had met with the Native American Advisory Group to discuss the meaning of "Indian preference". The advice given by the administration to the advisory group was that "Indian preference" meant if two individuals were equally qualified, then preference should

be given to the Indian applicant. The advisory group and the School District applied this interpretation in filling the position.

XVI.

On August 10, 1979, Mr. Neal Prescott telephonically communicated with Mr. William Johnson. The purpose of the communication was to inquire as to whether Mr. Johnson wished to be considered for the 1979-80 position of counselor-tutor for Indian students. On that date, Mr. Johnson delivered a hand-written letter to Mr. Prescott requesting that he be considered for the position (Exhibit No. 22) and letter from Eastern Washington University indicating that he would be recommended for certification as a counselor (Exhibit No. 11).

XVII.

On August 3, 1979, plaintiff completed all educational requirement necessary at Eastern Washington University for a certificate in guidance and counseling and Masters relating thereto. Plaintiff was issued a recommendation for certification dated August 3, 1979. On or before August 10, 1979, plaintiff delivered a copy of such recommendation to Neil Prescott at Central Valley School District and made written application for the position of Indian counselor-tutor with the District.

XVIII.

Approximately nine individuals had applied for the position of Indian counselor-tutor with defendant School District, only one of which was Indian--plaintiff. By August 21, 1979, the School District administration reduced the list to three individuals, plaintiff

and two caucasians, Peter Covella and John Moreland. School District administrators recommended the Native American Advisory Committee interview all three candidates and represented initially to that committee that all three were qualified. Later, District administrators would instruct the Committee that they could not consider Mr. Moreland for the position because he did not have a certificate in guidance and counseling nor any immediate prospect of receiving one.

XIX.

On August 21, the Executive Committee of the Native American Advisory Committee conducted interviews of the above three named individuals. Mr. Neil Prescott also attended such meeting. After interviewing all three individuals, the Executive Committee voted four to one to recommend Mr. Covella for the position of Indian counselor-tutor for the 1979-80 school year. Said vote was made with the idea that the Committee was at liberty to select the "best qualified" applicant, whether of Indian descent or not. At the time of this interview on August 21, 1979, plaintiff William Johnson was in all respects qualified to fill the position of Indian counselor-tutor.

XX.

The Court accepts the testimony of Dr. Robert Morrow, Executive Coordinator and Director of teaching certification at Eastern Washington University, on the subject of issuance of certificates. Dr. Morrow testified that as of August 3, 1979, plaintiff had completed all necessary educational requirements at E.W.U. for the University to recommend issuance of a guidance and

counseling certificate. Although Mr. Johnson did not apply for such certificate, the normal time lapse between application and issuance of the certificate by the Superintendent of Public Instruction is approximately twenty days. The Court finds that although the Superintendent of Public Instruction must take action to verify the contents of the application, such certificates are routinely granted upon recommendation by Eastern Washington University. Although the Court finds that the School District had consistently required that all necessary certification be on file with the School District prior to commencement of employment, the School District did not so advise Mr. Johnson. The Court further finds that the School District did not require the certificate to be on file with it before Mr. Johnson was interviewed and eligible for consideration for the position. Plaintiff was qualified for the position of counselor-tutor for Indians with Central Valley School District in all respects after August 3, 1979 and would have been eligible to assume his duties as counselor-tutor at the commencement of the 1979-80 school year and defendant School District is estopped to deny plaintiff's qualifications for consideration for the position of Indian counselor-tutor.

XXI.

At the time of the Executive Committee's interview of the three individuals, Mr. Neal Prescott, and Mr. Norm Stokke were present as representatives of the School District. Each of the school administrators conducted their own independent evaluation of the three candidates and concurred with the Executive Committee's recommendation that Mr. Covella be hired. That

occurrence was communicated to the assistant superintendent, Mr. Chuck Stocker, who also conducted an independent evaluation of the Advisory Committee's recommendation. The recommendation of the administration and the Executive Committee of the Native American Advisory Committee were forwarded to the Board of Directors. The Board of Directors accepted such recommendations on September 11, 1979, and executed a certificated employees contract with Mr. Peter Covella for the 1979-80 school year, for the position of counselor-tutor for Indian students.

XXII.

The contract year for the 1978-79 school year was completed upon the performance by plaintiff of 180.5 teaching days, which occurred on June 12, 1979. Plaintiff, as in the case of other certificated employees, received deferred payments for his performance during the 1978-79 school year throughout the summer of 1979, the last payment being received in August, 1979.

XXIII.

To the extent applicable, plaintiff's rights and privileges vis a vis the defendant School District were the subject of the contractual provisions of the Collective Bargaining Agreement, between the defendant School District and the Central Valley Education Association, during the 1978-79 school year. The provisions of the Collective Bargaining Agreement regarding reduction in force and employment pool rights were not applicable to the nonrenewal of plaintiff in May of 1979. It was the intent of the parties to the Agreement that such provisions would only apply to multiple reductions and not individual reductions.

XXIV.

In their determination regarding whether to hire William Johnson or Peter Covella for the position of Indian counselor-tutor with defendant School District, the Executive Committee of the Native American Advisory Committee, Neil Prescott, Charles Stocker, and deritively, the Board of Directors of Central Valley School District, used an erroneous definition of "Indian Preference". This Court finds that in order to effectuate the congressional intent and underline legislative policy of the Indian Education Act and the Indian Self-Determination Act, the concept of "Indian Preference" to the "greatest extent possible", requires, in this instance, that if a person of Indian origins meets the qualifications for the position that person must be offered such position even if there are more qualified persons of non-Indian descent.

XXV.

Defendant School District failed to give plaintiff Indian preference as required by the Indian Self-Determination Act and the Indian Education Act and had Indian preference been given, plaintiff would have been hired for the 1979-80 school year.

XXVI.

Had plaintiff been hired for the 1979-80 school year for the position of Indian counselor-tutor he would have made, excluding fringe benefits, $18,437.00. Plaintiff, despite good faith efforts to mitigate damages and obtain other employment was unable to do so, except for minor earnings selling wood and, after February 1980, commencement of an insulation business on his own. At

the time of trial he had earned approximately $1,713.02 in such business and this amount should be offset against the earnings lost by virtue of not being hired for the Indian counselor-tutor position. The Court has taken into account plaintiff's outstanding debts regarding the insulation business, present accounts receivable, and considering the nature of the business and the seasonal nature of employment of a school teacher, the Court finds these amounts essentially offset one another and no further adjustment should be made in the net loss of earnings. The Court notes that the plaintiff acquired assets regarding said insulation business but does not find that these acquisitions should be offset under the circumstances as they are offset by liabilities.

XXVII.

All of the acts and failures to act by defendant School District's agents and employees with respect to this case were within the scope and authority of said agents and employees and defendant Central Valley School District is responsible for such conduct.

XXVIII.

Plaintiff has asked for specific performance ordering hiring as "Indian counselor-tutor", under any of the claims for relief alleged. The Court having found a violation of the Indian Preference Law, the Court finds that the position of counselor-tutor offers a unique opportunity for one of an Indian race to benefit academically, culturally and socially members of his race. Neither plaintiff nor defendant have presented any evidence to suggest such a position is available in any other school district in the immediate vicinity or that

similar opportunities for counseling secondary school students are readily available to plaintiff. Of the school districts in Spokane County, Central Valley School District has the highest Indian population. Further, subsequent to the completion of this trial, the parties have reported to the Court that the position of "counselor-tutor" has been refunded by the federal government on a full-time basis for the 1980-81 school year at Central Valley School District. The Court finds in light of the foregoing, and plaintiff's strong desire to perform such duties, that this position is of such a unique nature that plaintiff cannot be made whole through damages alone and that defendant School District should be ordered to hire plaintiff to the 1980-81 school year in the capacity of "counselor-tutor" in order to effectuate the intent and purpose of the federal legislation herein involved. The Court finds the enforcement of such federal legislation in this matter is consonent with the remedial nature of the federal acts involved and is not likely to impair the administrative or educational process at Central Valley School District.

XXIX.

Plaintiff is entitled to all fringe benefits that would have accrued during the 1979-80 school year just as if he had been fully employed by the District throughout that year including any insurance program benefits, credit on district salary schedule, and any retirement credit that would have been earned with the Washington State Teachers Retirement System and plaintiff should be given the opportunity to make any contributions thereto that would have been made during the course of the 1979-80 school year, it being further the

finding of the Court that the District would have had to make matching contributions during the same period of time and that if plaintiff elects to make up such contributions the District should take all the steps necessary to complete its obligations in this regard.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

This Court has jurisdiction over the subject matter and parties to this action.

II.

Plaintiff failed to establish a *prima facie* case of race or national origin discrimination under *RCW* 49.60 and such claim was dismissed orally at the end of plaintiff's case in chief and it is hereby dismissed with prejudice.

III.

Plaintiff failed to establish a *prima facie* case of unlawful delegation of authority by the defendant School District's Board of Directors or Administrators and such claim was dismissed orally at the end of plaintiff's case in chief and is hereby dismissed with prejudice.

IV.

Defendant School District did not breach any contractual obligation to plaintiff under the "Collective Bargaining Agreement" (Exhibit No. 6) in effect between the parties. The nonrenewal of plaintiff in May, 1979, did not constitute a "reduction-in-force" thereunder and plaintiff was not entitled to the "employment pool" rights specified therein.

V.

Defendant School District did not violate the common law doctrine set forth in *Peters v. South Kitsap School District*, 8 Wn. App. 809 (1973) with respect to

duty to rehire former employees for new vacancies occurring after nonrenewal and before contract expiration. Plaintiff's 1978-79 contract with defendant School District expired, for purposes of applying *Peters*, on the last day of school for that school year.

VI.

Plaintiff's status with defendant School District for the 1977-78 school year was that of a part-time noncertificated employee.

Plaintiff's status with defendant School District for the 1978-79 school year was that of a part-time certificated employee.

VII.

The federally funded full-time position of "counselor-tutor" with defendant School District for the 1979-80 school year was one funded under the Indian Education Act (20 U.S.C. 24laa *et seq.*, and related provisions), which Act is designed for the benefit of Indians.

VIII.

Defendant School District, in failing to hire plaintiff for the position of "Indian counselor-tutor" for the 1979-80 school year violated the provisions of the Indian Self-Determination Act (25 U.S.C. 450 *et seq.*, and federal regulations relating thereto) and more particularly 25 U.S.C. 450 (e)(b)(1) in failing to give "Indian preference" to plaintiff.

IX.

Plaintiff was entitled to the position of "Indian counselor-tutor" with defendant School District for the 1979-80 school year and would have been hired in such position had "Indian preference" been given. Defendant School District is estopped to deny his eligibility for

consideration for such position or qualifications to perform such duties at the start of the 1979-80 year, had he been hired.

X.

As a direct and proximate result of violation of the "Indian preference" law, plaintiff suffered lost earnings consisting of $18,437 which is reduced by other earnings during the same period of $1,713.02, leaving lost earnings of $16,723.98. Said amount being a sum certain, plaintiff is entitled to interest on such amount between June 15, 1980 and September 15, 1980 at 6% for a total of $16,980.66. Plaintiff is also entitled to taxable costs in the sum of $181.75. Thus, a Judgment totalling $17,162.41 shall be entered for the plaintiff.

XI.

Plaintiff is entitled to all fringe benefits that would have accrued to his benefit during the 1979-80 school year including insurance program benefits and eligibility, credit on district salary schedule and credit with the Washington State Teachers Retirement System including the right to make up contributions to such system that would have been made during the course of 1979-80, in which event the defendant School District shall pay in, in addition to monies referenced elsewhere in these findings and conclusions, that amount of money it would or normally be required to pay on behalf of plaintiff to such system, and this Court shall retain jurisdiction for the limited purpose of entering such orders to third parties, including the Washington State Teachers Retirement System, as may be necessary to effect this relief.

XII.

Plaintiff is not entitled to either general damages or attorney's fees. Further, plaintiff's evidence regarding mental anguish, emotional distress and humiliation was insufficient to establish *prima facie* entitlement to such general damages.

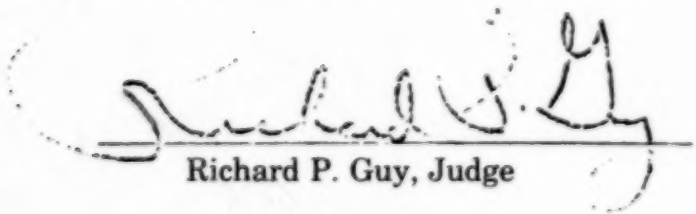
XIII.

In view of the strong congressional policy underlying the federal legislation granting "Indian preference" and the unique nature of the "counselor-tutor" position for Indians, defendant School District shall hire plaintiff as counselor-tutor for the 1980-81 school year. Such employment shall be on a written contract as a certificated employee with full rights and privileges accorded under *RCW* 28A.[illegible] and 28A.58 *except that* plaintiff's contract shall be a "provisional" one as set forth in *RCW* 28A.67.072.

XIV.

Plaintiff is entitled to entry of Judgment reflecting the relief set forth above. Said Judgment, along with these Findings of Fact and Conclusions of Law shall be equally applicable to Spokane County Cause No. 79-2-07293-6.

Done in open Court this 16 day of October, 1980.



Richard P. Guy, Judge

APPENDIX B

April 27, 1979

Dr. George M. Eisentrout, Supt.
Central Valley Sch. Dist. 356
South 123 Bowdish Rd.
Spokane, WA 99206

Dear Dr. Eisentrout:

With the exception of last year, this agency has regularly reviewed the certification status of persons serving in Educational Staff Associate (ESA) roles to determine if certification regulations adopted by the State Board of Education in 1971 and required since 1973 are being met.

We are making a special effort this year to notify superintendents and non-certificated ESA personnel before school is out for the following reasons:

1. Personnel hoping to enter or continue in preparation programs will have the opportunity to explore programs before summer sessions begin.
2. School districts will have an opportunity to recruit appropriately certificated personnel. Most of the colleges and universities will have names of newly certificated personnel by June or by the end of the summer session.
3. If Title IV-D funds are appropriated for counseling and guidance. districts employing non-certificated counselors may not be eligible to receive funds.

A compilation of information submitted by your district on the S-275 Certificated Personnel Report Form and the certification records maintained by this agency indicate that the following person(s) are as-

signed as counselors who do not hold the required ESA certification:

Mr. William Johnson

The purpose of this letter is to (1) request that you review the regulation which pertains, WAC 180-84-560; (2) ask that you encourage such persons to gain certification prior to the 1979-80 year if they are to be assigned as counselors; and (3) offer our assistance to the persons who need ESA certification.

We are sending a copy of this letter to the individual(s) concerned and encourage them to contact an approved counselor education program or consortium as soon as possible. We are enclosing a list of approved consortia as well as a resume of the preparation and certification requirements for school counselors in the state of Washington.

Should you have any questions regardinga certification requirements or procedures, please contact staff in the Certification and Licensing Section. (Phone: 206-753-6773.) If an error has been made regarding the certification status of anyone listed above, please inform Marjorie Anderson. (Phone: 206-753-6724.)

Thank you for your consideration of this important matter.

Sincerely,

DIVISION OF SPECIAL SERVICES

Michael G. Warden
Assistant Superintendent

Marjorie Anderson, Director
Pupil Personnel Services

MW:MA/cai

Enclosures

cc Mr. William Johnson

END OF DOCKET